



Santa Clara Law Review

Volume 40 | Number 1

Article 5

1-1-1999

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Recommended Citation

Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187 (1999).

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COMMENTS

A DEATH ROW INCARCERATION CALCULUS: WHEN PROLONGED DEATH ROW IMPRISONMENT BECOMES UNCONSTITUTIONAL

Jessica Feldman*

I. INTRODUCTION

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹

Since 1976, U.S. courts have consistently held the death penalty per se is constitutional.² However critics, both at home³ and abroad,⁴ disparage the death penalty's administra-

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1. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

2. *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, the Supreme Court reversed its 1972 decision *Furman v. Georgia*, 408 U.S. 238 (1972), which held that the existing death penalty laws were cruel and unusual in violation of the Eighth Amendment because the states administered the death penalty in an arbitrary and capricious way. *See Gregg*, 428 U.S. at 153. In *Gregg*, the Court decided that the death penalty was constitutional so long as the state imposed it in a way that comported with evolving standards of decency. *See id.* The Court suggested that death penalty statutes provide bifurcated trials with separate sentencing proceedings, mandatory consideration of aggravating and mitigating circumstances, proportionality review of every death sentence by an appellate court, and a right of automatic appeal to the state supreme court. *See id.* at 188-95.

3. Chief Justice Gerald Kogan of the Florida Supreme Court recently said: It doesn't make any difference if you are in favor of capital punishment or if you are opposed to capital punishment. The fact of the matter is that as a viable penalty, capital punishment does not work at this time and has not worked in the State of Florida for many, many, many

tion in the United States.⁵ In particular, critics target execution following a lengthy delay after sentencing as unjust.⁶ In 1995, Clarence Lackey, an inmate awaiting execution in Texas, raised a novel legal argument claiming that because of his lengthy wait on death row, it would be "cruel and unusual punishment" to execute him.⁷ The Supreme Court denied certiorari,⁸ but Justice Stevens issued a memorandum suggesting that lower courts examine the issue because there might well be a viable argument.⁹

In 1998, a similar "*Lackey claim*"¹⁰ came up for certiorari before the Supreme Court and again the Court declined to hear the issue.¹¹ This time, however, Justice Breyer issued a dissenting opinion, calling the claim a "serious one."¹² Breyer noted that a reasoned answer to the delay question could help ease the practical anomaly created when foreign courts refuse to extradite capital defendants to America for fear of undue

years.

Mark D. Killian, *Chief Justice Shares Parting Thoughts with Judges*, FLA. B. NEWS, July 15, 1998, at 6.

Likewise, Justice Moses Harrison II of the Illinois Supreme Court wrote in a 1998 opinion:

Despite the courts' efforts to fashion a death penalty scheme that is just, fair, and reliable, the system is not working. Innocent people are being sentenced to death. . . .

....

. . . It is no answer to say that we are doing the best we can. If this is the best our state can do, we have no business sending people to their deaths.

People v. Bull, 705 N.E.2d 824, 847-48 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part).

4. See *infra* Part II.D.

5. See *infra* Part II.C.1.b (questioning the purposes of punishments after a lengthy delay); Part II.C.2 (discussing the mental suffering inflicted upon the death row inmate); Part II.D (considering the international response to the U.S. death penalty system).

6. See *infra* Parts II, III, and IV (discussing how execution after the delay becomes unconstitutional).

7. See *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

8. See *id.*

9. See *id.* at 1047.

10. This particular Eighth Amendment challenge has come to be known as the "*Lackey claim*" based on the challenge brought by Clarence Lackey in 1995. *Id.* at 1045.

11. See *Elledge v. Florida*, ___ U.S. ___, 119 S. Ct. 366 (1998) (Breyer, J., dissenting) (disagreeing with denial of certiorari).

12. *Id.*

delay in execution.¹³ Thus, due to the seriousness of the claim and the importance of the issue to at least some members of the Supreme Court, it is probable that the Court may hear the issue in the near future.

This comment addresses whether execution after prolonged death row incarceration violates the Eighth Amendment prohibition of cruel and unusual punishment, hence whether there is merit to a "*Lackey* claim."¹⁴ The background section begins with an examination of the current state of capital punishment in the U.S.,¹⁵ the intent of the Framers of the Eighth Amendment,¹⁶ the purposes of the death penalty,¹⁷ and the recognition of the "death row phenomenon."¹⁸ The background then discusses the treatment of the *Lackey* claim in foreign jurisdictions¹⁹ and addresses the concerns over validating a *Lackey* claim.²⁰ The proposal section presents a solution to the constitutional issue by proposing a calculus for determining when a prolonged death row incarceration becomes too long.²¹ Finally, the conclusion urges the Supreme Court to accept a *Lackey* claim for review and to determine that execution after prolonged delay is indeed a violation of the Eighth Amendment.²²

II. BACKGROUND

A. *The Current State of Capital Punishment in the United States*

At the end of 1998, there were 3517 people on death row in the United States awaiting execution.²³ Thirty-eight states

13. *See id.*

14. *See infra* Parts II, III, and IV.

15. *See infra* Part II.A.

16. *See infra* Part II.C.1.a.

17. *See infra* Part II.C.1.b.

18. *See infra* Part II.C.2.

19. *See infra* Part II.D.

20. *See infra* Part II.E.

21. *See infra* Parts IV and V.

22. *See infra* Part VI.

23. *See* DEATH PENALTY INFO. CTR., *The Death Penalty in 1998: Year-End Report* (visited Jan. 4, 1999) <<http://www.essential.org/dpic/yrendrpt98.html>>. While the number of people on death row has reached a record high, *id.*, the U.S. Department of Justice, Bureau of Justice Statistics reports that there was a drop in new death sentences in 1997: from a yearly average of 300, since 1990, to 256 in 1997. TRACY L. SNELL, U.S. DEPT OF JUSTICE, BULLETIN NO. NCJ

and the federal government have capital punishment statutes.²⁴ Sixty-eight people were executed in 1998, down from seventy-four in 1997.²⁵ Two-hundred-fifty-six new death sentences were handed down in 1998.²⁶ To eliminate the backlog of death row inmates, one prisoner would have to be executed every day for the next fifty-four years.²⁷

The process a condemned prisoner faces upon sentencing is lengthy and complicated. Under current capital appeal guidelines, death penalty appeals generally consist of three levels.²⁸ At the first level, the defendant directly challenges the trial court's findings in the state appellate court.²⁹ All states except Arkansas require an automatic appeal.³⁰ The second level of appeals consists of the defendant's collateral challenge of his sentence and conviction to the state courts.³¹ Once the state court appeals have been exhausted, the defendant may file federal habeas corpus petitions attacking federal constitutional violations.³² The federal habeas proceedings can drag on for extended periods of time, as stays are granted and execution dates repeatedly delayed.³³

Three years ago, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996³⁴ ("AEDPA") to combat

172881, CAPITAL PUNISHMENT 1997, at 1 (rev. 1999). Thirty-eight states and the federal government authorize the death penalty. *See id.*

24. *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *supra* note 23.

25. *See* DEATH PENALTY INFO. CTR., *supra* note 23.

26. *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *supra* note 23.

27. The number of death row inmates as of December 1998 is 3517. *See* DEATH PENALTY INFO CTR., *supra* note 23. Assuming an average increase of 300 death row inmates per year, TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *supra* note 23, and an execution rate of one per day, including leap years, there would be an overall reduction of 65.25 death row inmates per year. The equation thus becomes $3517/65.25 = 54$ years.

28. *See* Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1907 (1998).

29. *See id.*

30. *See id.* In addition, the state only provides the defendant with the right to counsel for the first round of direct appeals. *See id.* at 1907-08.

31. *See id.* at 1908. There is a possibility of Supreme Court review of these challenges. *See id.*

32. *See id.* at 1907-09; *see generally* 28 U.S.C. § 2254 (1994) (enumerating requirements for federal habeas corpus petition).

33. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 7-9 (1995).

34. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.) [hereinafter AEDPA].

the problem of lengthy appeal proceedings.³⁵ The AEDPA "imposes a statute of limitations on appeals from state judgments. It also addresses the exhaustion requirement and the interaction between state and federal post-conviction attacks on judgments. Finally, the Act makes provisions for state appointment of competent counsel for capital defendants in post-conviction matters."³⁶ The AEDPA is relatively new, and its impact on the administration of the death penalty remains undetermined.³⁷ However, two significant problems with the AEDPA have already come to light.³⁸ First, the Act fails to fully address the delay that the several thousand³⁹ death row prisoners sentenced prior to 1996 have already endured.⁴⁰ The second problem is the inability of the states to meet the Act's requirement that they provide competent counsel to the condemned prisoners, enabling them to appeal their sentences collaterally in the state courts.⁴¹

Polls show the American public generally favors the death penalty,⁴² and the Supreme Court has not wavered from its *Gregg v. Georgia*⁴³ decision re-establishing capital punishment as a constitutionally viable sentence.⁴⁴ Thus, it seems certain that the Court will not abolish the death penalty in the near future.⁴⁵ However, with the increasing number of prisoners on death row, it seems certain that the wait for execution will only increase, as will concern over constitutional violations. The Supreme Court has not addressed the issue of

35. See Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 102 (1997).

36. *Id.*

37. See *id.* at 137.

38. See *id.*

39. As of December 31, 1995, there were 3054 inmates on death row. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 162043, CAPITAL PUNISHMENT 1995 (1996).

40. See Connolly, *supra* note 35, at 137.

41. Death Penalty Information Center reports that in the nearly three years since the AEDPA was passed, not a single state qualifies as providing adequate representation for death row inmates. See DEATH PENALTY INFO. CTR., *supra* note 23.

42. See Mark Gillespie, Gallup News Service, *Public Opinion Supports Death Penalty* (last modified Feb. 24, 1999) <<http://www.gallup.com/releases/pr990224.asp>>.

43. *Gregg v. Georgia*, 428 U.S. 153 (1976).

44. See *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

45. See Kozinski and Gallagher, *supra* note 33, at 2.

whether "the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation."⁴⁶ However, the 1995 *Lackey* Memorandum⁴⁷ and the 1998 *Elledge* dissent⁴⁸ indicate that the Court might, in the foreseeable future, address whether execution after protracted delay is indeed "cruel and unusual punishment."

B. *The Lackey Memorandum and the Elledge Dissent*

The "*Lackey* claim" first gained prominence in 1995 when Justice Stevens, joined by Justice Breyer, issued a memorandum respecting the denial of certiorari in *Lackey v. Texas*.⁴⁹ The two justices recognized the importance of the petitioner's claim that executing him after his seventeen-year wait on death row was cruel and unusual punishment.⁵⁰

Justice Stevens wrote that, although "novel,"⁵¹ *Lackey's* claim was "not without foundation."⁵² Justice Stevens added that although the Court has held the Eighth Amendment does not prohibit capital punishment,⁵³ the *Gregg* decision was based on "the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve 'two principal social purposes: retribution and deterrence.'"⁵⁴ Justice Stevens questioned whether either of those grounds retained force after a lengthy delay, especially in light of the mental suffering and uncertainty associated with the delay.⁵⁵ In addition, Justice Stevens acknowledged that some foreign countries recognize *Lackey*-type claims.⁵⁶

Justice Stevens stated that there may be constitutional significance to the different reasons for delay in imposition of

46. *Richmond v. Lewis*, 948 F.2d 1473, 1491 (9th Cir. 1991), *opinion vacated*, 986 F.2d 1583 (9th Cir. 1993), *rev'd on other grounds*, 886 P.2d 1329 (Ariz. 1994).

47. *Lackey*, 514 U.S. at 1045.

48. *Elledge v. Florida*, __ U.S. __, 119 S. Ct. 366 (1998) (Breyer, J., dissenting) (disagreeing with denial of certiorari).

49. *Lackey*, 514 U.S. at 1045.

50. *See id.*

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.* at 1045-46.

55. *See Lackey*, 514 U.S. at 1045.

56. *See id.* at 1046-47.

a sentence. He suggested it would be appropriate to distinguish among delays resulting from the prisoner's abuse of the system, the petitioner's legitimate right to review, and the state's negligent or deliberate action.⁵⁷ Finally, Justice Stevens concluded by saying that denying certiorari on a novel issue such as a *Lackey* claim would allow the state and federal courts to study the issue further before the Supreme Court addressed it.⁵⁸ Justice Breyer agreed that the issue was "an important undecided one."⁵⁹

In October 1998, the Supreme Court again denied certiorari on a *Lackey* claim in the case of *Elledge v. Florida*.⁶⁰ However, this time Justice Breyer dissented saying the petitioner's claim was a "serious one."⁶¹ Justice Breyer pointed out that Elledge's twenty-three years on death row was unusual.⁶² Justice Breyer also found merit in Elledge's argument that his execution would be cruel after Elledge faced death for nearly a generation due to the state's faulty procedures.⁶³

Justice Breyer appeared to accept Justice Stevens's calculus approach to attributing delay and noted that, in this case, eighteen of the twenty-three years of delay were spent on successful appeals.⁶⁴ He also noted the other five years were spent on additional appeals, that although unsuccessful, left the Florida Supreme Court divided 4-2.⁶⁵ Justice Breyer echoed the points raised by Justice Stevens in the *Lackey* Memorandum regarding the cruelty of executions carried out after prolonged delay and the treatment of the issue in foreign countries.⁶⁶

In the four years since *Lackey*, the lower courts have not heeded Justice Stevens's suggestion in the *Lackey* Memorandum to attribute delay based on the behavior of the parties. Instead, these courts have dismissed *Lackey* claims as proce-

57. See *id.* at 1047.

58. See *id.*

59. *Id.*

60. *Elledge v. Florida*, __ U.S. __, 119 S. Ct. 366 (1998) (Breyer, J., dissenting) (disagreeing with denial of certiorari).

61. *Id.* at 366.

62. See *id.*

63. See *id.* at 366-67.

64. See *id.* at 367.

65. See *id.* (citations omitted).

66. See *Elledge*, 119 S. Ct. at 367.

durally barred.⁶⁷ Justice Breyer asserted his readiness to address the issue,⁶⁸ and based on the treatment the lower courts have given the issue, it may be time the Supreme Court ruled on the actual merits of a *Lackey*⁶⁹ claim.

C. *The Underpinnings of a Lackey Claim*

1. *History of the Eighth Amendment*

a. *The Framers' Intent*

While Justice Stevens noted in the *Lackey* Memorandum that capital punishment per se does not violate the Eighth Amendment,⁷⁰ the Court has relied on two factors to find the imposition of death acceptable: (1) the Framers of the U.S. Constitution found capital punishment permissible, and (2) the death penalty serves the goals of retribution and deterrence.⁷¹ Thus, in litigating a *Lackey* claim, it becomes crucial to determine what the Framers intended when they wrote the Eighth Amendment.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishment."⁷² There is little direct evidence as to what the Framers intended by this language.⁷³ However, as history illustrates, early American courts did not permit

67. See *White v. Johnson*, 79 F.3d 432, 437 (5th Cir. 1996) (rejecting Eighth Amendment delay claim as barred by Teague Doctrine); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (rejecting *Lackey* claim as barred by abuse of habeas writ doctrine); *Turner v. Jabe*, 58 F.3d 924, 926 (4th Cir. 1995) (rejecting *Lackey* claim as procedurally barred); *McKenzie v. Day*, 57 F.3d 1461, 1463 (9th Cir. 1995) (same); *Fearance v. Scott*, 56 F.3d 633, 635 (5th Cir. 1995) (same); *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995) (rejecting *Lackey* claim as barred by abuse of habeas writ doctrine); *Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

68. See *Elledge*, 119 S. Ct. at 367.

69. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

70. See *id.* at 1045.

71. See *id.*

72. U.S. CONST. amend. VIII. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The courts have found the Eighth Amendment to apply to the states through the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

73. See *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring) ("We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights").

prolonged death row incarceration.⁷⁴ These courts “advocated swift infliction of the death penalty to further penological goals and to prevent the condemned prisoner from suffering unnecessarily.”⁷⁵ In 1890, the Supreme Court said a period of four weeks “confined in the penitentiary awaiting the execution of the sentence” was too long.⁷⁶

English common law influenced the U.S. Constitution and its amendments.⁷⁷ Therefore, in determining what the Framers intended, it is necessary to look at English authority as well. English law scholars have noted that both the English Declaration of Rights and English common law prohibited execution after a prolonged incarceration.⁷⁸ The Framers of the U.S. Constitution and Bill of Rights directly incorporated the English Declaration of Rights into the Eighth Amendment.⁷⁹ Indeed, the cruel and unusual punishment clause is a “verbatim copy of a prohibition in the English Bill of Rights of 1689.”⁸⁰ Accordingly, it seems clear that the Framers certainly knew of the English view of prolonged death row confinement and chose to incorporate the same values into the Eighth Amendment.⁸¹ As a result, the Eighth Amendment could have well been intended to prohibit lengthy delays between sentencing and execution.⁸²

74. See Kathleen M. Flynn, Note, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 300 n.48 (1997) (discussing the speed of execution following sentencing in early American history).

75. *Id.* at 300.

76. *In re Medley*, 134 U.S. 160, 172 (1890).

77. See *Kepner v. United States*, 195 U.S. 100, 125 (1904) (stating that when “ascertaining the meaning of the phrase from the Bill of Rights it must be construed with reference to the common law from which it was taken”). The Court referred to English common law. See *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925); *Ex parte Wells*, 59 U.S. 307, 311 (1856).

78. See *Pratt v. Attorney Gen. for Jamaica*, 4 All E.R. 769, 771 (P.C. 1993) (en banc) (concluding that death row delays of more than five years have a strong presumption of unconstitutionality).

79. See Flynn, *supra* note 74, at 301.

80. Flynn, *supra* note 74, at 301 n.55 (citing Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969)).

81. See Flynn, *supra* note 74, at 302.

82. See *McKenzie v. Day*, 57 F.3d 1461, 1488 n.20 (9th Cir. 1995) (Norris, J., dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)) (“The Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”).

The Supreme Court first addressed the meaning of "cruel and unusual punishment" in the 1878 case of *Wilkerson v. Utah*.⁸³ While the Court refused to "define with exactness the extent of the constitutional provision,"⁸⁴ it "found it safe to affirm that the amendment forbids unnecessary cruelty and torture."⁸⁵ In *In re Kemmler*,⁸⁶ the Court went further, finding that "punishments are cruel when they involve torture or lingering death [Cruel punishment implies] something inhuman and barbarous, something more than the mere extinguishment of life."⁸⁷

The Supreme Court again addressed the meaning of the words "cruel and unusual" in *Trop v. Dulles*⁸⁸ in 1958. In that opinion, the Court emphasized the inherent flexibility⁸⁹ in the phrase "cruel and unusual." The Court noted that the meaning of the Eighth Amendment comes from the "evolving standards of decency that mark the progress of a maturing society."⁹⁰ In addition, Chief Justice Warren wrote that the fundamental doctrine "underlying the Eighth Amendment is nothing less than the dignity of man."⁹¹

In *Gregg v. Georgia*,⁹² the case that reinstated capital punishment, the Supreme Court ruled that when applying the Eighth Amendment lower courts must consider whether a punishment is excessive.⁹³ "For a punishment to be excessive it must either involve unnecessary and wanton infliction of pain or be grossly out of proportion to the severity of the crime."⁹⁴ Therefore, the Eighth Amendment's prohibition of cruel and unusual punishment applies not only to cases of excessive and repugnant forms of physical suffering,⁹⁵ but also to "practices deemed cruel and unusual by contemporary

83. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

84. *Id.* at 135-36.

85. Amber A. Bell, Note, *McKenzie v. Day: Is Twenty Years on Death Row Cruel and Unusual Punishment?*, 26 GOLDEN GATE U. L. REV. 41, 47 (1996).

86. *In re Kemmler*, 136 U.S. 436 (1890) (upholding constitutionality of death by electrocution).

87. *Id.* at 447.

88. *Trop v. Dulles*, 356 U.S. 86 (1958).

89. See Bell, *supra* note 85, at 48.

90. *Trop*, 356 U.S. at 101.

91. *Id.* at 100.

92. *Gregg v. Georgia*, 428 U.S. 153 (1976).

93. See *id.* at 173.

94. Bell, *supra* note 85, at 49.

95. See Connolly, *supra* note 35, at 103.

standards.”⁹⁶ Consequently, if executing a death row inmate after lengthy delay violates contemporary standards of decency, it may also violate the intent of the Framers.⁹⁷

b. *The Goals of Deterrence and Retribution*

The other justification relied upon in imposing the death penalty is that execution fulfills the aims of deterrence and retribution.⁹⁸ However, as Justice Stevens notes in the *Lackey* Memorandum, “[i]t is arguable that neither ground retains any force for prisoners who have spent some seventeen years under a sentence of death.”⁹⁹

Retribution refers to the theory that a person engaged in wrongful conduct should be punished because he does wrong.¹⁰⁰ When dealing with the death penalty, retribution translates into the “eye for an eye” theory: a murderer killed someone, thus the murderer deserves to die.¹⁰¹ However, this theory is not normally carried out under the American criminal justice system.

In order to be consistent under this logic . . . if we kill killers, we should also rape rapists, rob robbers, and beat those convicted of battery. Because we do not require that punishments for all crimes be like the crimes themselves, it is arbitrary to invoke this retaliatory principle as a requirement of justice when punishing murderers.¹⁰²

Another argument *Lackey* claimants advance is that prolonged death row confinement is sufficient punishment in and of itself.¹⁰³ As Justice Stevens stated in *Lackey*, “after such an extended time [seventeen years], the acceptable state

96. Bell, *supra* note 85, at 49.

97. If the Framers considered a delay of several weeks impermissible, the same type of delay would remain impermissible today. See *supra* note 82.

98. See *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

99. *Id.*

100. See Dan Crocker, Note, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER RACE & JUST. 555, 561 (1998).

101. See *id.* at 562.

102. *Id.*

103. See *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) (agreeing with denial of certiorari) (noting that the prisoner’s mental pain in awaiting execution is significant punishment comparable to the punishment of actual execution); see also *McKenzie v. Day*, 57 F.3d 1461, 1486 (9th Cir. 1995) (Norris, J., dissenting) (remarking that 20 years on death row satisfies the state interest in retribution).

interest in retribution has arguably been satisfied by the severe punishment already inflicted."¹⁰⁴ In *McKenzie v. Day*,¹⁰⁵ Judge Norris of the Ninth Circuit dissented from the majority's refusal to recognize an Eighth Amendment claim and pointed out: "[t]he years McKenzie has spent on death row [over two decades] appear to be unprecedented. This delay, coupled with the allegedly harsh and punitive confinement conditions on death row, arguably satisfies the state's interest in exacting retribution."¹⁰⁶ Furthermore, as Chief Justice Rehnquist has previously pointed out, "[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution."¹⁰⁷ When a state executes a prisoner after he or she has spent a prolonged period of time on death row, the sentence is overly retributive.¹⁰⁸

Deterrence is the other justification for the death penalty under *Gregg*.¹⁰⁹ The general theory of deterrence espouses the idea that the possibility of punishment prevents people from breaking the law.¹¹⁰ There are serious problems with justifying the death penalty with a deterrence theory. Different studies have shown the death penalty has no deterrent effect regardless of how long a prisoner is confined on death row.¹¹¹ In addition, Justice Stevens pointed out in *Lackey* that "the additional deterrent effect from an actual execution now, on the one hand, as compared to seventeen years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal."¹¹² If there is no deterrent effect in executing a prisoner after a lengthy delay, then the second

104. *Lackey*, 514 U.S. at 1045.

105. *McKenzie*, 57 F.3d 1461 (9th Cir. 1995) (Norris, J., dissenting).

106. *Id.* at 1486.

107. *Coleman*, 451 U.S. at 960 (Rehnquist, J., dissenting) (disagreeing with denial of certiorari).

108. See *supra* text accompanying notes 74-75 (discussing that time spent on death row awaiting executing causes great mental suffering and this suffering alone is a distinct punishment).

109. See *Lackey*, 514 U.S. at 1045.

110. See Crocker, *supra* note 100, at 565.

111. See *id.* at 565 n.77 (discussing data from three different studies in 14 different countries and 47 states showing no significant deterrent effect from capital punishment).

112. *Lackey*, 514 U.S. at 1046. Justice Stevens also quoted from his concurrence in *Coleman*, 451 U.S. at 952, in which he stated, "[T]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself." *Lackey*, 514 U.S. at 1046.

justification of the death penalty under *Gregg* fails as well.¹¹³

If the Framers did not intend prisoners to sit on death row for years awaiting execution, and if neither retribution nor deterrence is served by executing prisoners after a lengthy delay, then an execution after such a delay fails the *Gregg* test and conflicts with the Eighth Amendment.¹¹⁴

2. *The Emergence of the "Death Row Phenomenon"*

Prisoners raising an Eighth Amendment challenge to execution after protracted delay cite the psychological suffering they endure awaiting execution as an additional reason their execution is impermissibly cruel.¹¹⁵ The psychological suffering associated with incarceration on death row is known as the "death row phenomenon."¹¹⁶

The "death row phenomenon" gained prominence during the 1989 case of Jans Soering, a German national detained in England pending extradition to the United States, where he was to be tried for murder.¹¹⁷ However, court opinions had discussed the conditions on death row long before the *Soering* case.¹¹⁸

113. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

114. See *id.* (stating that absent psychological justification, the death penalty is gratuitous infliction of suffering).

115. See *Lackey*, 514 U.S. at 1046 n.1 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari) (referring to petitioner's argument that dehumanizing effects of lengthy imprisonment make execution unconstitutional under Eighth Amendment). But cf. *Potts v. State*, 376 S.E.2d 851, 859 (Ga. 1989) (stating that conditions on death row are not unusual because many terminally ill patients live with knowledge of their impending death).

116. See Daniel P. Blank, Book Note, *Mumia Abu-Jamal and the "Death Row Phenomenon,"* 48 STAN. L. REV. 1625, 1626 (1996) (reviewing MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW* (1995)).

While critics have long claimed that capital punishment itself violates these obligations [referring to U.S. International rights obligations], they have more recently charged that the extensive stays on death row in the United States epitomize a new concept in human rights jurisprudence, the "death row phenomenon," which holds that the psychological torture of an unreasonably long incarceration pending execution is at least as violative of international human rights standards as the execution itself.

Id. at 1626. For a discussion of different international judicial responses to the Death Row Phenomenon, see Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon,"* 30 GEO. WASH. J. INT'L L. & ECON. 39 (1996).

117. See *infra* Part II.D.

118. See *Furman v. Georgia*, 408 U.S. 238, 288 (1972); *In re Medley*, 134 U.S.

The Supreme Court recognized mental anxiety was a component of pre-execution confinement as early as 1890.¹¹⁹ In *In re Medley*¹²⁰ the Court acknowledged mental suffering played a large role in the four-week wait for execution.¹²¹ "[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it"¹²² Since the *Medley* Court disapproved of the psychological suffering associated with a mere four-week delay, the argument that a delay of seventeen years imposes such cruelty applies with much greater force today.¹²³ If four weeks was considered an impermissibly lengthy delay, then seventeen years must be considered even more of an unconstitutionally long delay.

In *Trop v. Dulles*,¹²⁴ the Supreme Court held that severe mental suffering translates into a cognizable Eighth Amendment claim.¹²⁵ While the *Trop* decision concerned the denationalization of a wartime deserter,¹²⁶ its principles apply to a *Lackey* claim. The Court in *Trop* found the mental suffering associated with potential denationalization precluded application of the punishment under the Eighth Amendment.¹²⁷ "The *Trop* Court recognized that the Eighth Amendment prohibits punishments which (1) undermine human dignity or (2) violate society's 'evolving standards of decency' from which the Eighth Amendment derives its meaning."¹²⁸ Based on *Trop*, subsequent death row prisoners have argued their mental suffering undermines human dignity and the prolonged psychological anguish experienced violates society's evolving standards of decency.¹²⁹

160, 172 (1890); *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1292-94 (Mass. 1980); *People v. Anderson*, 493 P.2d 880, 894-95 (Cal. 1972).

119. See *In re Medley*, 134 U.S. 160 (1890).

120. *Id.*

121. See *id.*

122. *Id.* at 172.

123. See *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

124. *Trop v. Dulles*, 356 U.S. 86 (1958).

125. See *id.*

126. See *id.*

127. See *id.* at 101-02.

128. Flynn, *supra* note 74, at 308.

129. See *id.*

The Supreme Court of California applied *Trop* in its 1972 *People v. Anderson*¹³⁰ decision, holding capital punishment impermissibly cruel under the California Constitution.¹³¹ The court discussed capital punishment in light of *Trop* and concluded:

The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment. Judged by contemporary standards of decency, capital punishment is impermissibly cruel. . . . Measured by the 'evolving standards of decency that mark the progress of a maturing society,' capital punishment is, therefore, cruel within the meaning of . . . the California Constitution.¹³²

The court also noted:

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.¹³³

The *Anderson* decision is not the only opinion declaring significant psychological torture and mental suffering accompany death row confinement, thereby making the execution after delay unconstitutionally cruel and unusual. In *Furman v. Georgia*,¹³⁴ Justice Brennan's concurring opinion relied on

130. *People v. Anderson*, 493 P.2d 880 (Cal. 1972), *overruled by constitutional amendment as stated in* *People v. Hill*, 839 P.2d 984, 984 (Cal. 1992).

131. *See id.* at 882.

132. *Id.* at 895.

133. *Id.* at 894.

134. *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring). In *Furman*, the Court considered whether capital punishment violates the Eighth Amendment. *See id.* The Court determined that when juries have unrestricted discretion and no guidance in deciding whether to impose either a life sentence or the death penalty, it is cruel and unusual punishment in violation of the Eighth Amendment. *See id.* at 238. In his concurrence, Justice Brennan concluded that since the death penalty degrades human dignity, it is per se unconstitutional. *See id.* at 285. Justice Brennan identified four principles to determine whether a death sentence comports with human dignity:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any

the *Anderson* decision to find capital punishment per se unconstitutional.¹³⁵ Justice Brennan acknowledged "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."¹³⁶

A Massachusetts court, in *District Attorney for Suffolk District v. Watson*,¹³⁷ also discussed the mental suffering and psychological torture associated with death row confinement. The *Watson* case held the death penalty unconstitutional because of the physical and mental torture involved in imposing the sentence.¹³⁸ The court discussed the unique anguish experienced by a death row inmate:

A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. . . . Having to face an inevitable death, any man, whatever his convictions, is torn asunder from head to toe. The feeling of powerlessness and solitude of the condemned man, bound up and against the public coalition that demands his death, is in itself an unimaginable punishment.¹³⁹

Mental anguish suffered by death row inmates, the "death row phenomenon," is unique to condemned prisoners.¹⁴⁰ It is unlikely that a court will find a lengthy wait on

penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id. at 282. Justice Brennan found that capital punishment failed to satisfy any of these principles, and therefore, concluded that it violated the Eighth Amendment. *See id.* at 285.

135. *See id.*

136. *Id.* at 288.

137. *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980).

138. *See id.* at 1283.

139. *Id.* at 1292-94 (Liacos, J., concurring).

140. *See generally* Richard E. Shugrue, "A Fate Worse Than Death"—An Essay on Whether Long Times on Death Row are Cruel Times, 29 CREIGHTON L. REV. 1, 18-20 (1995) (discussing scientific studies of the "death row phenomenon"); *see also* Blank, *supra* note 116 (discussing effect of incarceration on death row).

death row cruel and unusual enough by itself to necessitate the commutation of a sentence. However, the prospect of experiencing the death row phenomenon for a lengthy period of time and *then* facing an execution may be sufficient for a court to grant relief.

D. Capital Punishment in Foreign Countries

The international community has criticized the United States for its application of the death penalty.¹⁴¹ In 1998, the United Nations Commission on Human Rights met in Geneva and called for a moratorium on all executions.¹⁴² Sixty-three nations co-sponsored the resolution, but the United States, along with countries including Bangladesh, China, South Korea, and Rwanda, opposed the moratorium.¹⁴³

International opinion regarding execution appears increasingly disfavorable.¹⁴⁴ Bulgaria and Lithuania became the latest countries in the world to abolish the death penalty.¹⁴⁵ Lithuania's constitutional court found the death penalty to be unconstitutional, and the Bulgarian parliament voted for legislation abolishing the death penalty.¹⁴⁶

In addition to international opinion disapproving of capital punishment, the United States has faced resistance from its allies on this policy issue. Some foreign countries are reluctant to extradite capital defendants to the United States, fearing such defendants will be subjected to the death row phenomenon.¹⁴⁷ In 1989, England refused to extradite Jans Soering, a German national who committed a double homicide in Virginia and then fled to England.¹⁴⁸ Soering convinced the European Court of Human Rights that the implementation of the death penalty in the United States conflicted with the European guarantee against inhuman and degrad-

141. See *infra* notes 139-47 and accompanying text.

142. See DEATH PENALTY INFO. CTR., *What's New* (visited Jan. 4, 1999) <<http://www.essential.org/dpic/whatsnew.html>> [hereinafter DEATH PENALTY INFO. CTR., *What's New*].

143. See *id.*

144. See *infra* notes 142-57 and accompanying text.

145. See DEATH PENALTY INFO. CTR., *What's New*, *supra* note 142.

146. See *id.*

147. See Blank, *supra* note 116, at 1630.

148. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). For a more detailed discussion of the *Soering* case, see Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1292-306 (1996).

ing punishment.¹⁴⁹ In *Soering v. United Kingdom*,¹⁵⁰ the European Court prevented Soering's extradition on the grounds that the average six to eight year delay on Virginia's death row violated Article III of the European Human Rights Convention Charter.¹⁵¹ The *Soering* decision illustrates the concern that foreign nations express over the U.S. system of capital punishment and how such foreign opinion directly affects U.S. justices.¹⁵² The international response prompted Justice Breyer to note in his *Elledge* dissent that "a reasoned answer to the 'delay' question could help ease the practical anomaly created when foreign courts refuse to extradite capital defendants to America for fear of undue delay in execution."¹⁵³

Despite the Supreme Court's unwillingness to rule on the constitutionality of prolonged death row incarceration, courts elsewhere have addressed the issue. The courts of England have recognized a *Lackey*-type claim, holding lengthy delays between sentencing and death to be unconstitutionally cruel and unusual.¹⁵⁴

In *Pratt v. Attorney General for Jamaica*,¹⁵⁵ the British Privy Council considered whether a prolonged delay in carrying out a death sentence was cruel and unusual punishment.¹⁵⁶ The Privy Council found a prolonged delay violated the Jamaican Constitution regardless of the cause of the delay¹⁵⁷ and commuted the death sentences of two inmates who had spent fourteen years on death row.¹⁵⁸ The Privy Council stated:

There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the ag-

149. See Connolly, *supra* note 35, at 128.

150. *Soering*, 161 Eur. Ct. H.R. (ser. A) (1989).

151. See Crocker, *supra* note 100, at 571.

152. See generally Blank, *supra* note 116; Doherty, *supra* note 148.

153. *Elledge v. Florida*, ___ U.S. ___, 119 S. Ct. 366 (1998) (Breyer, J., dissenting) (disagreeing with denial of certiorari).

154. See *Pratt v. Attorney Gen. for Jamaica*, 4 All E.R. 769 (P.C. 1993).

155. *Id.*

156. See *id.*

157. See *id.* at 770.

158. See *id.* at 789.

ony of execution over a long extended period of time.¹⁵⁹

The court focused not only on the delay, but on the repeated setting and postponing of execution dates.¹⁶⁰ The constant changing of the execution dates contributed to the psychological cruelty of delay, making the execution unconstitutional.¹⁶¹ The Privy Council found death row delays exceeding five years presumptively unconstitutional.¹⁶² The United States has not followed the Privy Council's lead, but Justice Stevens referred to the Privy Council's decision in stating that "the highest courts in other countries have found arguments such as [Lackey's] to be persuasive."¹⁶³

E. *Why Courts are Reluctant to Recognize the Lackey Claim*

The U.S. circuit courts addressing *Lackey* claims advance two reasons for their refusal to commute capital sentences. First, these courts note that no federal precedent supports the *Lackey* claim. Second, and more forcefully, a death row prisoner should not be able to prolong his own death row incarceration through the post-conviction process and then later claim that same delay matures into the basis of sentence commutation.¹⁶⁴

In *Richmond v. Lewis*,¹⁶⁵ the court addressed the death row prisoner's delay ripening into a constitutional violation.

A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates—less successful in their at-

159. *Id.* at 783.

160. *See Pratt*, 4 All E.R. at 787.

161. *See id.*

162. *See id.* at 771.

163. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari) (citations omitted).

164. *See Richmond v. Lewis*, 948 F.2d 1473, 1491-92 (9th Cir. 1991); *Stafford v. Oklahoma*, 59 F.3d 1025, 1028 (10th Cir. 1983).

165. *Richmond*, 948 F.2d 1473.

tempts to delay—would be forced to face their sentences.¹⁶⁶

Although the *Richmond* opinion was subsequently vacated, the *McKenzie v. Day*¹⁶⁷ majority decision quoted the *Richmond* passage and adopted its analysis as controlling precedent in the Ninth Circuit.¹⁶⁸

Other U.S. courts voice similar concerns. In *Stafford v. Ward*,¹⁶⁹ the Tenth Circuit noted that because a defendant chooses to pursue appeals, he cannot then argue an Eighth Amendment violation based on the extended delay of the sentence.¹⁷⁰ Likewise, in *Turner v. Jabe*,¹⁷¹ the Fourth Circuit quoted *Chessman v. Dickson*,¹⁷² a 1960 case in which an inmate challenged his death sentence on the grounds that his confinement in a death cell for eleven and a half years subjected him to cruel and unusual punishment:

It may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a sentence of death) as a prize for one who can stall the process for a given number of years, especially when in the end it appears the prisoner never really had any good points.¹⁷³

Also, in *White v. Johnson*,¹⁷⁴ the Fifth Circuit addressed the issue of a prisoner's choice in pursuing appeals and concluded the prisoner, White, benefited from the long period of time the state of Texas considered his case.¹⁷⁵ White could not raise an Eighth Amendment constitutional violation because the process of review was in place to protect his other rights.¹⁷⁶ The court argued White could have chosen to forgo further appeals and face his conviction.¹⁷⁷ At the very least, the court noted that White could not claim an Eighth Amendment violation because he failed to make the state aware of the detrimental effect of the delay.¹⁷⁸

166. *Id.* at 1491-92.

167. *McKenzie v. Day*, 57 F.3d 1493 (9th Cir. 1995) (en banc).

168. *See id.* at 1494.

169. *Stafford*, 59 F.3d at 1028.

170. *See id.*

171. *Turner v. Jabe*, 58 F.3d 924, 928 (4th Cir. 1995).

172. *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960).

173. *Turner*, 58 F.3d at 928 (quoting *Chessman*, 275 F.2d at 607).

174. *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996).

175. *See id.*

176. *See id.* at 439.

177. *See id.*

178. *See id.*

The death penalty remains a constitutional option of punishment, but the current administration of the death penalty raises serious questions regarding the applicability of its justifications, and therefore, the constitutionality of executing a prisoner after a prolonged death row incarceration.¹⁷⁹

III. STATEMENT OF THE PROBLEM: RECOGNIZING A "LACKEY CLAIM" AND APPLYING A CALCULUS

The application of the death penalty is justified on the bases that the Framers of the Constitution approved of capital punishment and that it serves the twin aims of deterrence and retribution.¹⁸⁰ However, as Justice Stevens questioned in the *Lackey* Memorandum, do these justifications retain any force after a prisoner has spent a lengthy time on death row?¹⁸¹ The Framers and early judges did not contemplate lengthy delays.¹⁸² It is likely the Framers would not have approved of a mere four-week wait in 1890,¹⁸³ let alone the now-common seventeen-year wait.¹⁸⁴ In addition, there seems to be little deterrent value in executing someone after seventeen years, and such an execution may well be overly retributive.¹⁸⁵ While other countries and social scientists in the United States question the value of executing a prisoner after a long delay,¹⁸⁶ the length of time between sentencing and execution increases.¹⁸⁷

Considering that the death penalty remains a popular tool of punishment,¹⁸⁸ and that there is no indication it will be abolished, it is questionable how prisoners' Fourteenth

179. See *Elledge v. Florida*, ___ U.S. ___, 119 S. Ct. 366 (1998) (Breyer, J., dissenting) (disagreeing with denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

180. See *Lackey*, 514 U.S. at 1045.

181. See *id.*

182. See Flynn, *supra* note 74, at 300 n.48 (noting that New York colonial laws required execution of convicted felons within four days of sentencing).

183. See *In re Medley*, 134 U.S. 160, 172 (1889) (commenting on the "cruelty" of keeping condemned prisoner uninformed as to date, day, and time of his execution).

184. See *Lackey*, 514 U.S. at 1045.

185. See *id.* at 1045-46.

186. See *supra* Part II.D (discussing international response to U.S. capital punishment).

187. See *supra* notes 23-26.

188. See *supra* note 23 (number of new death sentences in 1997 was 256).

Amendment right¹⁸⁹ to appeal their sentences can be reconciled with the Eighth Amendment's prohibition against cruel and unusual punishment. As Justice Stevens pointed out in the *Lackey* Memorandum, "[T]here may well be constitutional significance to the reasons for the various delays. . . . It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State."¹⁹⁰

Despite Justice Stevens's suggestion, the lower courts have not used a calculus when examining *Lackey* claims. Instead, these courts have typically dismissed such claims on other grounds without discussing the merits of a *Lackey* claim.¹⁹¹ These courts fear that recognizing an Eighth Amendment claim will lead prisoners to file frivolous appeals, prolonging their sentences to later raise a *Lackey* claim.¹⁹² However, using the type of calculus proposed by Justice Stevens could quell the lower courts' fears. Justice Stevens's proposal could determine when a prisoner's death sentence should be commuted. A death row calculus balances the concerns of the lower courts and the states against the cruel and unusual delays currently facing death row inmates. Thus, the calculus might be a feasible solution to the cruel and unusual punishment occurring when a prisoner is executed after a lengthy delay.

IV. ANALYSIS

It is increasingly clear that there are significant problems with the way the death penalty is administered in the United States. Foreign countries refuse to extradite potential death row inmates to the United States for fear such individuals

189. The Fourteenth Amendment guarantees prisoners the right to appeal their sentences. U.S. CONST. amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

190. *Lackey*, 514 U.S. at 1047.

191. See *supra* note 65.

192. See *supra* notes 160-74 and accompanying text.

will be imprisoned on death row too long.¹⁹³ Further, psychologists and social scientists recognize and write extensively about the death row phenomenon.¹⁹⁴ More defendants are sentenced to death every year,¹⁹⁵ which in turn increases the length of a death row incarceration. And while every prisoner has the right to appeal the death sentence imposed, each is also entitled to protection from imposition of cruel and unusual punishment. How can these two constitutional guarantees be simultaneously applied?

This question can only be answered by first establishing that the Eighth Amendment does prohibit prolonged death row incarceration followed by execution. If this is true, then the state's responsibility to carry out death sentences must be reconciled with the state's duty to uphold the Eighth Amendment.¹⁹⁶ Commuting a death sentence after a calculated period of time is the only remedy to the constitutional violation of execution after a lengthy delay.¹⁹⁷ Imposing a threshold period of time and then applying a calculus, like the one suggested by Justice Stevens in *Lackey*,¹⁹⁸ is the best way to determine when this time limit passes.

A. The Purposes for Capital Punishment Fail When an Inmate's Sentence is Delayed

As previously discussed, the Supreme Court reinstated the death penalty on the grounds that (1) the Framers of the Constitution approved of the death penalty, and (2) that execution fulfills deterrent and retributive goals.¹⁹⁹ As the court stated in *Gregg*, "the sanction imposed cannot be so totally without penological justification that it results in the gratui-

193. See discussion of the *Soering* case, *supra* Part II.D.

194. See *supra* notes 114-37 and accompanying text.

195. See *supra* note 23.

196. The Eighth Amendment applies to the states through the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 675 (1962).

197. The court cannot improve death row conditions because the mental suffering and anxiety caused by uncertainty of the final disposition of the sentence is an inherent characteristic of death row. See *Flynn*, *supra* note 74, at 331. In addition, due to the serious nature of the punishment and the extensive procedural guidelines discussed in Part II.A, the appeal procedures cannot be too streamlined. Therefore, commutation is the only remedy. See *Flynn*, *supra* note 74, at 330-32.

198. *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

199. See discussion *supra* Part II.C.1.

tous infliction of suffering."²⁰⁰ Thus, if the three justifications are not satisfied by a penalty of death, then that penalty is unconstitutional.

While the Framers certainly could not have fathomed delays as lengthy and as common as they are today,²⁰¹ the Framers also could not have foreseen the complexity of contemporary death row appeals.²⁰² The Framers based the Eighth Amendment on the English Bill of Rights of 1689, which also included a prohibition against cruel and unusual punishment.²⁰³ The *Pratt* Court recognized that execution after inordinate delay would have violated that document's cruel and unusual punishment prohibition.²⁰⁴ In England, if a situation arose where the state kept the prisoner awaiting execution for years, the court would commute the death sentence.²⁰⁵ Although the Framers may have intended the Eighth Amendment to go beyond the scope of the English Bill of Rights, their use of the exact language contained in the English version indicates that the Framers intended to provide at least an equal level of protection.²⁰⁶

Even assuming the Framers may have approved of some delay, concern over the mental suffering associated with death row incarceration surfaced over a century ago.²⁰⁷ The *Medley*²⁰⁸ Court disapproved of the consequences of a mere four-week delay because of the psychological effects of pre-execution confinement. The psychological trauma would surely be more severe in a seventeen-year delay.²⁰⁹ Thus, it is reasonable to infer that the Framers would find the mental suffering and psychological torture experienced by a contem-

200. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

201. *See Kozinski & Gallagher, supra* note 33, at 10-11 (noting that concluding a capital case within seven years is rare, ten years is about average, and over two decades is not atypical).

202. Currently death penalty appeals go through various stages and can be challenged on many different grounds. *See supra* notes 28-33 and accompanying text.

203. *See supra* notes 78-79.

204. *See Pratt v. Attorney Gen. for Jamaica*, 4 All E.R. 769, 744 (P.C. 1993).

205. *See id.*

206. *See Connolly, supra* note 35, at 117 n.130.

207. *See In re Medley*, 134 U.S. 160 (1890).

208. *Id.*

209. *See Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

porary death row inmate unacceptable.²¹⁰

The deterrent and retributive justifications of the death penalty fail after prolonged death row imprisonment. The deterrent value of the death penalty relates to how promptly the state inflicts the punishment.²¹¹ If a death sentence is eventually set aside or if there is a prolonged delay before execution, the imprisonment during the period following sentencing is still a significant form of punishment.²¹² "[T]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself."²¹³ If this is true, there is no greater deterrent effect in execution after lengthy delay, and thus commutation of the sentence would serve the same penological goals.

Not only is there no additional deterrent effect in execution after a prolonged delay, but the state has already met its retributive goal. A state sentences a prisoner to death, not to lengthy confinement under harsh and punitive conditions on death row and then death. When a state executes a prisoner after such a delay, that punishment then becomes overly retributive and thus, more than the crime necessitates.²¹⁴ "As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second. . . ."²¹⁵ Eighth Amendment claims revolve around whether pain is a necessary part of the punishment. Since both lengthy delay and psychological torture are inherently unnecessary to imposing a death sentence, the mental anguish that a death row inmate suffers prior to execution satisfies the state's retributive need.²¹⁶

210. *See id.* at 1045.

211. *See* *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) (agreeing with denial of certiorari).

212. *See id.*

213. *Id.*

214. *See Lackey*, 514 U.S. at 1046 ("[W]hen the death penalty 'ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.") (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

215. *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1294 (Mass. 1980) (Liacos, J., concurring) (quoting ALBERT CAMUS, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 131-56 (Justin O'Brien trans., Random House 1960) (1957)).

216. *See* Flynn, *supra* note 74, at 303-04.

Thus, if the Framers would have disapproved of execution after the current delays, and if there is no additional deterrent or retributive purpose in executing a prisoner after a prolonged death row incarceration, then the constitutionality of imposing such a sentence under *Gregg* is questionable.

B. *International Support for Lackey Claims*

In addition to the lack of justification for the *Gregg* factors, the international response to the implementation of capital punishment in America and the English rulings on similar *Lackey* claims provide support for the argument that execution after delay is in fact "cruel and unusual." In *Pratt*,²¹⁷ the English court used the very portion of the English Bill of Rights that provided the basis for the Eighth Amendment²¹⁸ to commute death penalty sentences after lengthy confinement.²¹⁹

While the *Soering* decision by the European Commission of Human Rights is non-binding on U.S. courts, it is nevertheless important because it illustrates the opinion foreign jurisdictions hold about the U.S. capital punishment system. It also highlights the challenge the United States faces in prosecuting those who have murdered U.S. citizens while in the United States, since some foreign nations refuse to extradite because of the lengthy delays which, by international standards, have been deemed cruel and unusual.²²⁰

The U.S. system also appears in conflict with human rights standards in many progressive societies.²²¹ The United States is in the company of such nations as the former Soviet republics, Middle Eastern nations, and Third World countries including Bangladesh, Ethiopia, Somalia, and Zaire in continuing to use the death penalty.²²² This is ironic considering the United States prides itself on being a free, just, and democratic society.²²³

217. *Pratt v. Attorney Gen. for Jamaica*, 4 All E.R. 769 (P.C. 1993).

218. *See Lackey*, 514 U.S. at 1046-47.

219. *See Pratt*, 4 All E.R. at 773-74.

220. *See Blank, supra* note 116, at 1631; *see also Elledge v. Florida*, ___ U.S. ___, 119 S. Ct. 366 (1998).

221. *See Connolly, supra* note 35, at 122-23.

222. *See id.* at 123.

223. *See id.*

C. *Dealing with Lackey Claims by Applying a Calculus*

The Eighth Amendment prohibits executing a prisoner after a prolonged delay based on the failure of all of the *Gregg* factors. Such execution conflicts with the "evolving standards of decency that mark the progress of a maturing society."²²⁴ Given that the Eighth Amendment prohibits execution after prolonged delay, how can a state employ the death penalty in such a way that it does not run afoul of the Eighth Amendment?

The death penalty is discretionary; thus, a state choosing to employ capital punishment bears the responsibility of executing prisoners in compliance with the Constitution.²²⁵ If the Constitution forbids execution after lengthy death row confinement, then the state loses its right to execute after the permissible time frame passes. Further, since long delays alone satisfy the retributive and deterrent interests of the state,²²⁶ commuting death sentences will not hinder the state's goal of punishing criminals. Punishments must comply with the "evolving standards that mark the progress of a maturing society," with "the basic concept underlying the Eighth Amendment [being] nothing less than the dignity of man."²²⁷

If the U.S. Supreme Court settled on a threshold period of delay, after which it would commute a death sentence, it would provide a uniform approach to the death penalty quandary. One possible threshold period of time the Court should consider is ten years.²²⁸ Ten years is the average time an inmate spends on death row before execution.²²⁹ The courts must consider appeals carefully,²³⁰ but the process should be

224. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

225. As of December 1998 thirty-eight states and the federal government chose to use the death penalty. See TRACY L. SNELL, U.S. DEPT OF JUSTICE, *supra* note 23. All state and federal government must obey the Constitution. See U.S. CONST. art. VI, § 2.

226. See *supra* discussion Part II.C.2.

227. *Trop*, 356 U.S. at 100.

228. See Kozinski & Gallagher, *supra* note 33, at 10-11 (10 years is about average for a death penalty case to conclude); see also *People v. Chessman*, 341 P.2d 679, 699 (Cal. 1959) ("It is, of course, in fact unusual that a man should be detained for more than 11 years pending execution. . . ."). According to Chief Justice Rehnquist, a delay of seven to eight years between sentencing and execution is a "serious malfunction in our legal system." See Connolly, *supra* note 35, at 131.

229. See Kozinski & Gallagher, *supra* note 33, at 10-11.

230. See *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (per curiam) (rec-

completed in an efficient manner, and the sentence carried out, thereby fulfilling the deterrent and retributive functions of punishment. If the courts commuted death sentences after a ten-year delay, the states would have incentive to pass laws requiring the courts to hear motions and appeals in an expedited manner. By making capital appeals a priority, the court could complete the process in a reasonable time period, while affording the petitioner his due process rights and furthering the deterrent and retributive interests. Death penalty cases would probably not unduly burden the courts since death penalty petitions only represent about two percent of all habeas corpus petitions in federal courts.²³¹

Once the prisoner has spent ten years on death row,²³² the prisoner could petition the court to apply a calculus, like the one suggested by Justice Stevens, to determine if he has become ineligible for the death penalty. This calculus proposes attributing delays spent on death row based on the behavior of the parties.²³³ The calculus distinguishes between those delays resulting from the petitioner's legitimate exercise of his right to review;²³⁴ the petitioner's abuse of the judicial system by escape or repetitive, frivolous filings;²³⁵ and any negligent or deliberate action by the state.²³⁶ Therefore, to deter-

ognizing that a death sentence is qualitatively different than other sentences requiring special care in judicial review).

231. See JOHN SCALIA, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 164615, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-96 (1997). The U.S. Department of Justice, Bureau of Justice Statistics reported that both state and federal prisoners filed a total of 63,634 petition in 1995. *Id.* at 4. Of these, 4395 were habeas corpus petitions. *Id.* at 2. Of the habeas corpus petitions, 129 emanated from death penalty sentences. *Id.*

232. While the 10-year time limit may seem somewhat arbitrary itself, it is important to impose a threshold time in order to remedy the courts' differing opinions about when a prisoner can raise an Eighth Amendment claim. Several courts have refused to hear *Lackey* claims on the basis the petitioner could have raised his claim in an earlier habeas petition. See *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995); *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995). Often the court creates a paradox: if a prisoner files too early his claim is not yet ripe for an Eighth Amendment challenge, yet if he waits too long the court faults him for not filing earlier. See *id.* If there was a threshold period of time after which the *Lackey* claimant could raise the challenge, it would alleviate this procedural problem. See Shugrue, *supra* note 140, at 20-21.

233. See *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

234. See *id.*

235. See *id.*

236. See *id.*

mine when the state has forfeited its right to execute, the time in the second category can be attributed to the prisoner (and thus not count toward the ten-year threshold), and the time in the first and third categories can be attributed to the state (and therefore count toward the ten-year threshold).²³⁷

The courts should attribute to the state the entire portion of time spent on direct appeals, as the prisoner has no option to forgo the mandatory appeals.²³⁸ In *McKenzie*, the court ultimately denied the Eighth Amendment claim, but the dissent noted that the state accepted responsibility for the portion of the delay spent on direct appeal.²³⁹

The courts should also attribute to the state time spent on collateral appeals. The courts cannot expect a prisoner to forgo his chance at life if he thinks he may have the slightest chance at a meritorious claim, nor should the courts require him to forgo these appeals.²⁴⁰ Furthermore, a petitioner is required to first complete the direct appeal, then the state habeas appeal, before he can even file a federal habeas petition.²⁴¹ Thus, the courts should not charge the petitioner for the time it takes to be eligible to file in federal court. Nor can the courts fault the petitioner for pursuing his due process rights under the Fourteenth Amendment.

Some courts have ignored Justice Stevens's recommendation to distinguish between meritorious and frivolous appeals, and have just dismissed all claims when collateral appeals caused part of the delay.²⁴² This approach is unfair to those

237. *See id.* Some may argue that a calculus fails to address properly the real problem of torturous death row confinement. *See Flynn, supra* note 74, at 331 n.234. This view argues time on death row is no less torturous because defendant is appealing his sentence. *See id.* "An appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription." *People v. Anderson*, 493 P.2d 880, 895 (Cal. 1972).

238. *See supra* note 30 and accompanying text.

239. *See McKenzie v. Day*, 57 F.3d 1461, 1485 (9th Cir. 1995) (Norris, J., dissenting).

240. In the *Lackey* Memorandum, Justice Stevens lumped the direct and collateral appeals together as the petitioner's legitimate right to appeal. *See Lackey*, 514 U.S. at 1047; *see also Crocker, supra* note 99, at 569 ("[I]t seems unfair to expect a prisoner to expedite his own execution.").

241. *See supra* notes 30-32.

242. *See McKenzie*, 57 F.3d at 1486; *see also Stafford v. Ward*, 59 F.3d 1025 (10th Cir. 1995) (rejecting Eighth Amendment claim because appellant chose to avail himself of collateral appeals).

prisoners with legitimate appellate issues: such prisoners must give up the Eighth Amendment protections implicated by *Lackey* in their pursuit of other constitutional claims.²⁴³ All constitutional rights are sacred and are equally applicable.²⁴⁴ Just because a "delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual . . . the right to pursue due process of law must not be set off against the right to be free of inhuman treatment."²⁴⁵ A petitioner has a constitutional right to pursue his collateral appeals, and the courts cannot hold the exercise of that right against him.²⁴⁶

The final category that should count against the state, in the ten-year calculus, is negligent or deliberate action by the state. Had there been evidence of negligent or deliberate acts by the state, there may have been a different outcome in some *Lackey* claim cases.²⁴⁷ When a state's faulty procedures cause extended delays, it is constitutionally significant, and the courts should count those delays against the state in the calculus.²⁴⁸ It would be unfair and unjust to require a prisoner to bear the burden of the state's wrongful conduct.

The courts can only subtract from the calculus, and attribute to the prisoner, the time spent on appeals dismissed by the court as frivolous. If frivolous claims will not count toward an Eighth Amendment claim, there will be no risk of prisoners abusing the system to create a *Lackey* claim. In addition, discounting the time spent on frivolous appeals could placate the courts that have refused to find a *Lackey*

243. See Flynn, *supra* note 74, at 330.

244. See District Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980) (Liacos, J., concurring).

245. *Id.*

246. See *infra* note 243 and accompanying text.

247. See White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) (barring *Lackey* claim because petitioner did not allege delay was due to negligent or intentional misconduct on part of state); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (noting that a *Lackey* claim has potential merit when petitioner shows evidence of state's deliberate or negligent delay).

248. See Elledge v. Florida, __ U.S. __, 119 S. Ct. 366, 366-67 (1998) (Breyer, J., dissenting) ("[P]etitioner argues forcefully that his execution would be especially 'cruel.' Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State's own faulty procedures and not because of frivolous appeals on his own part.").

claim meritorious for fear of prisoner self-delay.²⁴⁹ Some courts considering a *Lackey* claim may have held differently had the prisoner's time spent on frivolous appeals been subtracted from the delay.²⁵⁰

In summary, had the circuit courts applied the version of the calculus described above, there may have been a different outcome in *Lackey* claim cases.

V. PROPOSAL

The courts are responsible for hearing death penalty appeals and have the power to commute unconstitutional sentences.²⁵¹ Based on the unconstitutionality of execution after prolonged confinement, courts should recognize and remedy *Lackey* claims.

Due to the lack of justifications for the death penalty after long delays, the Supreme Court should determine that after ten years are attributed to the state on appeals, courts must commute death sentences. Commutation is the only way to relieve the prisoner of suffering while continuing to provide Fourteenth Amendment due process protection.²⁵²

The ten-year threshold treats all prisoners alike and sets a standard for acceptable death penalty administration.²⁵³

249. See *McKenzie v. Day*, 57 F.3d 1461, 1489 (9th Cir. 1995) (Norris, J., dissenting). Judge Norris criticizes the majority for their failure to recognize the *Lackey* claim:

[T]he majority substitutes a policy lecture professing "fear" that sustaining McKenzie's claim will "wreak havoc with the orderly administration of the death penalty in this country . . . [and] dramatically alter the calculus in granting stays of execution in the hundreds of death penalty cases now pending." But what does this have to do with whether the Eighth Amendment's ban on cruel and unusual punishment will be violated if McKenzie is executed after spending twenty years on death row?

Id. at 1489 (alteration in original) (citations omitted).

250. It also appears the courts favor petitioners letting the court know of suffering. "A motion for expedited review is also necessary so that reviewing courts can distinguish between strategic behavior on the part of the prisoner who quietly waits with the hope of asserting a *Lackey* claim later and bona fide claims of malicious or intentional state delay." *White*, 79 F.3d at 439.

251. The courts do this on a regular basis. Of the 5796 people under death sentence between 1977 and 1997, 32% received "other dispositions such as appellate court decisions or commutations." TRACY L. SNELL, U.S. DEPT OF JUSTICE, *supra* note 23.

252. See discussion, *supra* Part II.C.1.

253. As the average time spent on death row declined as a result of the 10-year death row wait limit, the threshold time could be adjusted.

The ten-year limit is fair because it gives the state and the prisoner time to properly address the multiple appeals, but does not cause the prisoner to suffer indefinitely.²⁵⁴ Imposing the calculus described in Part IV, attributing time to the prisoner and the state depending on the reasons for delay, is the best way to determine when the ten-year threshold is met.

As Justice Stevens indicated in *Lackey*, there is "constitutional significance"²⁵⁵ to the reasons for delay.²⁵⁶ A prisoner's abuse of the system should not constitute an Eighth Amendment claim providing the prisoner a way to avoid his constitutionally imposed death sentence.²⁵⁷ However, courts cannot count the time spent on legitimate appeals against the prisoner without violating due process protection and the right to be free from cruel and unusual punishment. Requiring a prisoner to forgo either the right to appeal his sentence or an Eighth Amendment claim forces the prisoner to choose the protection of one constitutional guarantee over another. This choice automatically denies the prisoner one constitutional protection. Delays caused by the state on negligent or deliberate action must count against the state as well. State action negligently or deliberately keeping a prisoner confined to death row, causing that prisoner additional delay and suffering, could alone violate the Eighth Amendment.

If the courts engaged in the type of calculus suggested by Justice Stevens as analyzed in this comment, all parties involved would benefit. The prisoner would focus on raising only meritorious arguments for fear those less compelling would count against him in the calculus. The state would endeavor to avoid negligent and deliberate delays which, if too lengthy, would divest it of its power to execute. The courts would also have an incentive to hear cases expeditiously, especially if they received priority on the docket. Finally, the families of the victims would also benefit from the more rapid

254. This approach allows the appeals 10 years to work their way through the system. Concluding appeals in 10 years is possible. See *supra* note 224. Furthermore, if the prisoner knew that after 10 years his sentence would either be commuted or carried out, it would alleviate some of the uncertainty attributing to the mental suffering.

255. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J.) (mem.) (respecting denial of certiorari).

256. See *id.*

257. See *Richmond v. Lewis*, 948 F.2d 1473, 1491-92 (9th Cir. 1991).

closure of the case.²⁵⁸

VI. CONCLUSION

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁵⁹ Executing prisoners after lengthy delays violates this notion recognized by the Court as controlling Eighth Amendment jurisprudence.

The justifications for the death penalty—the Framers' intent, deterrence, and retribution—do not apply in cases of prolonged death row imprisonment.²⁶⁰ In the absence of these justifications, capital punishment is cruel and unusual and therefore unconstitutional when applied after a lengthy delay. Lengthy death row confinement causes severe mental pain and psychological suffering.²⁶¹ Adopting a calculus dictating when death row confinement becomes too torturous would be a valid solution to the problem. The Supreme Court should accept a *Lackey* claim which addresses these issues and decide once and for all on the merits of the claim.

258. "[V]ictims are entitled to closure much sooner than 25 or 30 years after their perpetrators' convictions" *State v. Richmond*, 886 P.2d 1329, 1333 (Ariz. 1994) (commuting death row inmate's sentence due to length of time on death row, but not ruling on the merits of a *Lackey* claim).

259. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

260. *See supra* Part IV.

261. *See supra* Part II.C.2.
